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IN THE MATTER OF a Board of Inquiry
appointed pursuant to s.38(1) of the
Human Rights Code, R.S.O. 1990, c.H.19

BETWEEN

MARTIN ENTROP

Complainant

- and -

IMPERIAL OIL LIMITED

Respondent

Date of Complaint: 16 January 1992

Date of Decision: September 27, 1994

Board of Inquiry: Professor Constance Backhouse

Counsel: Counsel for the Commission - Mark Hart

Counsel for the Complainant - Jeffrey M. Andrew
Elizabeth Nurse

Counsel for the Respondent - James Noonan
Colin Campbell Q.C.



INTERIM DECISION #2

Counsel for the parties have sought preliminary rulings on two matters:

- 1) the production of documents; and
- 2) application for intervenor status.

PRODUCTION OF DOCUMENTS

I will not repeat the alleged facts surrounding this complaint, since they were outlined in the first preliminary ruling issued in this case. The earlier preliminary ruling dealt with the scope of the issues to be canvassed in this matter. In the earlier hearing, the Commission sought a ruling that the whole of the Respondent's "Alcohol and Drug Policy" should be subjected to inquiry under the Human Rights Code, while the Respondent sought to limit the inquiry to the portions of the Policy which affected the individual Complainant specifically. I ruled that it was premature to determine the scope of the hearing at the outset, and that the extent to which the complaint raised issues about the Policy as a whole was a matter for evidentiary argument and analysis.

That ruling has led to some disagreement over the documentation which ought to be produced at the outset of the hearing. Counsel for the Commission requested that the Respondent produce documents pertaining to the Complainant's personnel files and his personal experience under the Alcohol and Drug Policy, as well as documents pertaining to the history,

development, implementation and cost of the Respondent's Alcohol and Drug Policy more generally. The Respondent agreed to produce the documentation regarding the individual Complainant, but argued that no evidentiary basis had yet been established upon which to compel the production of documentation regarding the wider Policy.

The case of Olarte v. Commodore Business Machines Ltd. (1983), 4 C.H.R.R. D/1705 at D/1711 sets forth the test for production of documents: "Under section 12 of the Statutory Powers and Procedures Act any person can be required to produce in evidence at a hearing documents relevant to the subject matter." The case of Dudnik v. York Condominium Corp. No. 216 (No. 2) (1990), 12 C.H.R.R. D/325 elaborated at D/333:

A subpoena duces tecum can be refused or quashed where the request for documents is seen to be irrelevant in nature, or simply a so-called fishing expedition, is simply speculative, or is oppressive.... However, given that there is not any pre-trial discovery of documents, and given that the issue of relevancy often cannot be determined without first reviewing the documents, a subpoena should not be quashed, or refused, where it simply seeks documents that, *prima facie*, may be relevant.

Counsel for the Respondent argued that the "relevance" or "*prima facie relevance*" of the documentation concerning the whole Policy had not yet been established. Furthermore, he asserted that such documentation was extremely voluminous, and would necessitate an undue delay in order to permit the Respondent to conduct a time-consuming and expensive process of searching through records and duplicating files. He suggested that a better approach would be to deal with the production of documents

by phases - to begin with evidence that dealt directly with the individual Complainant, to rule on the substance of the specific complaint, and then to entertain submissions regarding the need to expand the hearing to address the matter of the Policy as a whole. Counsel for the Commission objected to this process, which he labelled a "bifurcated proceeding," arguing that it would also create delay and might lead to an inefficient duplication of argument.

In my view, the position I reached in the previous preliminary ruling dictates that a "phased" approach to this hearing is preferable. This hearing should proceed with an inquiry into the situation of Mr. Entrop and his specific concerns regarding the "Alcohol and Drug Policy." Mr. Entrop's individual situation must be the focus of the first phase of this hearing. Accordingly, all of the documentation requested which relates to Mr. Entrop's employment records must be produced now.

I would not, however, categorize this "phased" process as one of complete "bifurcation." It may not be possible to separate the concerns of Mr. Entrop from an inquiry into certain wider features of the Policy itself. Consequently, it may not be possible to rule on the substance of the specific complaint of Mr. Entrop prior to entertaining submissions regarding another phase of the hearing process, as the Respondent has suggested. The extent to which Mr. Entrop's employment situation will necessarily raise concerns about the "Alcohol and Drug Policy" as a whole will undoubtedly become clearer as the hearing

progresses. If, at any point, issues relating to the wider Policy are shown to have become relevant to this complaint, additional production of documents will be in order at that time.

INTERVENOR STATUS

The counsel representing Mr. Entrop at this hearing also sought leave to appear on behalf of the Canadian Civil Liberties Association (CCLA). Arguments were made regarding the application of the CCLA to be permitted to intervene as *amicus curiae*, "as a friend of the Board of Inquiry." Counsel for the CCLA specified that he was not seeking the status of a party, with full rights of examination and cross-examination. Instead, the CCLA requested a limited right of participation, including the right to present oral and written argument at the conclusion of the case. In addition, the CCLA requested the option (which it conceded might never be exercised), to present evidence at some point during the proceedings, if such was necessary to produce a full evidentiary record. Counsel for the Respondent did not dispute the CCLA's right to present submissions at the close of hearing, but opposed its request to be given the option to call evidence.

The case of American Airlines Inc. v. Competition Tribunal (1988), 33 Admin. L.R. 229 (F.C.A.), noted at 237 that there is wide latitude for granting *amicus curiae* status:

Courts and tribunals are masters of their own procedures. As part of this principle, courts have also been recognized as having an inherent authority or power to permit interventions basically on terms and conditions that they believe are appropriate in the circumstances.

Various factors have been articulated as relevant in determining when it is appropriate to grant such status. Leshner v. Ontario (No. 1) (1992), 16 C.H.R.R. D/175, quoted Muldoon and Scriven at D/183:

- (1) as a general rule, *amicus* intervention should be looked upon more favourably in cases involving matters of public interest than in cases where only private rights are concerned;
- (2) the characterization of "matters of public interest" should be made in a liberal and common sense fashion with the understanding that, while on one hand almost every decision of the court affects the public in one way or another, any issues, even those couched in terms of private litigation, carry with them significant implications for the development and implementation of public policy and the public rights;
- (3) as a general rule, interventions should be permitted only where the proposed applicants can demonstrate that they have a significant commitment to the matters that are represented in the issue presented; and
- (4) as a general rule, interventions should be favourably considered where the issue to be argued is more likely to be understood in terms of its practical implication or impact or where the intervenor may bring to the exposition of the problem or to its solution a dimension or argument, experience or understanding which the court may find useful.

See also Regional Municipality of Peel and Attorney General of Ontario v. Great Atlantic and Pacific Co. Canada Ltd., et al. (1990), 74 O.R. (2d) 164 (Ont.C.A.), per Dubin, C.J.O., at p.167.

Inquiries under the Human Rights Code almost without exception will involve "matters of public interest." The Canadian Civil Liberties Association is a national organization with recognized expertise in human rights and civil liberties, which has a serious interest in the relationship between mandatory alcohol and drug tests in the workplace and concepts of individual dignity and privacy. The CCLA has made submissions to

a variety of governmental and legislative committees on issues relating to privacy and human rights. It has also been granted intervenor status in many constitutional and human rights cases in the past.

In my view, this is an appropriate case in which to grant the Canadian Civil Liberties Association *amicus curiae* standing. I will allow the CCLA to make submissions at the conclusion of the case. I will entertain submissions about the right to call evidence if and when the request arises.

Sgt 27/94

Date



Constance Backhouse
Chair, Board of Inquiry